

LEGAL BASIS FOR MLTS REGULATION

In its pending Notice of Proposed Rulemaking to consider application of caller ID and location information to emergency communications services and equipment not now covered by the enhanced 9-1-1 (“E9-1-1”) rules,¹ the FCC seeks comment “on the Commission’s authority to require compliance with the E911 rules by manufacturers of multi-line systems.”²

Much of the regulation imposed on manufacturers has been explicitly directed by Congress.³ At other times, the FCC has relied on general authority in Sections 1 and 4 of the Communications Act, as in the creation of Part 68 of the Rules on wire equipment interconnection and in the adoption of Section 22.921 requiring a “rollover” feature in cellular telephone receivers.⁴ Occasionally, the Commission will cite its “ancillary authority” to carry out the purposes recited in Section 1 of the Act.

The Broadcast Flag Order. A recent exercise of ancillary authority was the decision to impose “broadcast flag” restrictions on redistribution of digital TV content, in the professed interest of encouraging (or not discouraging) ample creation of programming for the DTV medium.⁵ Defending its authority to impose the restrictions (Broadcast Flag Order, ¶¶27-35), the Commission stated:

We recognize that the Commission’s jurisdiction over manufacturers of equipment in the past has typically been tied to specific statutory provisions and that this is the first time the Commission has exercised ancillary jurisdiction over consumer equipment manufacturers in this manner. *Id.*, ¶32.

¹ 47 C.F.R. §20.18, with definitions at Section 20.3.

² Notice, FCC 02-326, released December 20, 2002, ¶91.

³ *See, e.g.*, Sections 302, 303(s), 330(a).

⁴ Notice, at n. 220.

⁵ *Digital Broadcast Content Protection*, MB 02-230, FCC 03-273, released November 4, 2003, ¶4. (“Broadcast Flag Order”)

The Broadcast Flag Order explains further:

Ancillary jurisdiction may be employed, in the Commission's discretion, where the Commission's general jurisdictional grant in Title I of the Communications Act covers the subject of the regulation and the assertion of jurisdiction is "reasonably ancillary to the effective performance of [its] various responsibilities."⁶

The Broadcast Flag Order found that television receivers are among the "instrumentalities, facilities [and] apparatus" associated with both wire and wireless communication and are therefore covered by statutory definitions that bring them "within the scope of the Commission's general authority outlined in Section 2(a) of the Communications Act." *Id.* The specific restrictions on digital content redistribution are reasonably ancillary both to the FCC's historic responsibilities for TV broadcasting and to more recent Congressional instructions as to DTV:

The statutory framework for the [DTV] transition, coupled with the support in the legislative history and the Commission's ongoing and prominent initiatives in the area, make it clear that advancing the DTV transition has become one of the Commission's primary responsibilities under the Communications Act at this time.⁷

In the FCC's judgment:

[A]bsent redistribution control regulation for DTV broadcasts, the record indicates that content providers will be reluctant to provide quality digital programming to broadcast outlets and will instead direct such content to pay television systems that can implement adequate content protection mechanisms. [citation omitted] The diversion of high quality digital programming away from broadcast television will lead to an erosion of our national television structure.⁸

⁶ ¶29, quoting from *U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968). Given the need for ancillary jurisdiction to be grounded in some general grant of authority, the fine distinctions as to whether a power *springs* from Title I or is *ancillary to* the purposes in Title I need not detain us here.

⁷ Broadcast Flag Order, ¶30.

⁸ Broadcast Flag Order, ¶31.

The MLTS Regulatory Nexus. Just as the Commission grounded its DTV content redistribution restrictions in Sections 1 through 4 of the Communications Act, so it has properly proposed to find MLTS regulatory authority on the basis that the equipment is among the “instrumentalities, facilities [and] apparatus” incidental to wire and wireless communication.⁹ Again, without needing to decide whether this authority springs from Title I or is reasonably ancillary to the purposes expressed there, it suffices to say that a strong link exists between MLTS E9-1-1 compliance and the “effective performance” of the Commission’s responsibilities.¹⁰ The vital mission of “safety of life and property” (Notice, n.221), of course, is an added Title I purpose not found in the Broadcast Flag Order analysis.

In the 10 years since 1994, Congress has spoken both specifically and generally about the importance of automatic identification and location of wire and wireless callers. In the first category is the Wireless and Public Safety Communications Act of 1999 (“1999 Act”), whose stated purpose is

[T]o encourage and facilitate the prompt deployment throughout the United States of a seamless, ubiquitous and reliable end-to-end infrastructure for communications, including wireless communications, to meet the Nation’s public safety and other communications needs.¹¹

Section 3 of the 1999 Act ordered the Commission to “designate 9-1-1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate

⁹ Notice at ¶91, n.221, citing *Computer and Communications Industry Association v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, *Louisiana Public Service Commission v. FCC*, 461 U.S. 938 (1983).

¹⁰ *U.S. v. Southwestern Cable*, note 6, *supra*.

¹¹ Public Law 106-81, Section 2(b).

authorities and requesting assistance.” The designation expressly covered “both wireline and wireless telephone service.”¹²

Plainly, the emergency call infrastructure is not “seamless, ubiquitous and reliable” if the millions of employees or residents whose workplaces or multiple dwelling units (“MDUs”) are served by PBXs and other MLTS devices cannot be identified or located by police, fire or medical responders.

Another important Congressional signpost, albeit more generic than the 1999 Act, was the addition in 1996 of Section 256 of the Communications Act. While that section disclaims any intent to add to the FCC’s powers, the words of §256(a)(2) should reassure the FCC that exercising ancillary authority to make MLTS E9-1-1 more reliable is congruent with Congressional intentions:

(2) to ensure the ability of users and information providers to seamlessly and transparently transmit and receive information between and across telecommunications networks.

In the MLTS case, of course, the networks requiring a seamless traverse are the Public Switched Telephone Network (“PSTN”) and the dedicated 9-1-1 systems.

Regulation of whom? While the analogy to DTV content redistribution regulations relates chiefly to ancillary jurisdiction over manufacturers -- of TV sets on the one hand, MLTS devices on the other -- there is nothing in the concept of ancillary jurisdiction that necessarily limits the Commission’s authority to makers of equipment. Thus, the “MLTS Proposal of NENA and APCO” submitted for the record of Docket 94-102 on July 24, 2001, and opened for comment by the Notice, addresses -- in recommended Part 68 revisions -- not only

¹² Section 3 is codified at 47 U.S.C. §251(e)(3). The Commission responded to the 1999 Act’s mandate by establishing federal transition periods for areas of the country where 9-1-1

manufacturers but also MLTS owner/operators. Such persons could be employers or distributors of the equipment. The Proposal also suggests Part 64 amendments applicable to carriers, but the jurisdictional nexus there is straightforward.

Even if the FCC were reluctant to extend its jurisdiction to persons neither carriers nor manufacturers, the agency understands the leverage available through regulation of the basic manufactured product. Even this can be accomplished indirectly, to wit:

[A]lthough our Part 68 rules appear to establish elaborate requirements for terminal equipment manufacturers, the fundamental obligation that the rules impose is on the local exchange carriers -- they must allow Part 68-compliant equipment to be connected freely to their networks. [footnote omitted] . . . [B]ut equipment that is not Part 68-registered is not freely connectable to the public switched telephone network and thus has limited marketability.¹³

If the FCC's jurisdiction is firmly founded, of course, the agency can proceed directly or indirectly. An example of the former is the adoption of the "rollover" rule for cellular carriers at Section 22.921, which the Commission applied to both service providers and manufacturers.¹⁴

Conclusion. For the reasons discussed above, we believe the Commission would be on firm legal ground if it chose to apply to manufacturers of MLTS equipment, such as PBXs, requirements aimed at identifying and locating 9-1-1 callers whose transmissions are processed through such equipment. Whether the requirements should be imposed at the state rather than the federal level is, in our view, a policy choice and not a legal compulsion.

emergency dialing was not yet in use. Fifth Report and Order, CC Docket 92-105, FCC 01-351, released December 11, 2001, ¶5.

¹³ 2000 Biennial Review of Part 68, 15 FCC Rcd 24944 (2000), ¶7.

¹⁴ Second Report and Order, CC Docket 94-102, 14 FCC Rcd 10954 (1999), ¶88. Virtually all the major wireless equipment manufacturers played a positive role in the adoption of the rule, and none raised at the time any legal impediment.